Supreme Court, U.S.
FILED
061459 APR 27 2007
OFFICE OF THE CLERK

NO. 07-____

IN THE

Supreme Court of the United States

Peter Boggan,
Petitioner,

v.

Mississippi Conference of the United Methodist Church.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

Louis H. Watson, Jr.
(Counsel of Record)
Louis H. Watson, Jr., P.A.
520 East Capitol Street
Jackson, MS 39201
(601) 968-0000

April 27, 2007

QUESTIONS PRESENTED

1. Should this Court grant certiorari to resolve the six-to-one circuit conflict over whether the Religious Freedom Restoration Act is constitutional as it applies to federal law?

2. Should this Court grant certiorari to resolve the one-to-one circuit conflict over whether the alleged ministerial exception to Title VII of the Civil Rights Act of 1964 is valid under the Religious Freedom Restoration Act?

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

PETITION FOR WRIT OF CERTIORARI 1

OPINIONS BELOW 1

JURISDICTION 1

RELEVANT STATUTORY PROVISION 1

STATEMENT 2

REASONS FOR GRANTING THE WRIT 4

I. The Courts of Appeals Are Intractably Divided over the Questions Presented 4

II. The Circuit Conflict is Untenable Give the Importance of the Questions Presented 6

III. The Fifth Circuit's Decision is Wrong on the Merits 8

CONCLUSION 11

TABLE OF AUTHORITIES

Cases

Christians v. Crystal Evangelical Free Church (In re Young), 141 F.3d 854 (8th Cir. 1998) 3
City of Boerne v. P.F. Flores, et al., 521 U.S. 507 (1997) 4, 9
E.E.O.C. v. Roman Catholic Diocese of Raleigh, N.C., 213 F.3d 795 (4th Cir. 2000) 5
Employment Division, Department of Human Resources of Oregon, et al. v. Smith, 494 U.S. 872 (1990) 4
Gellington v. Christian Methodist Episcopal Church, Inc., 203 F.3d 1299 (11th Cir. 2000) 6
Green v. Connally, 330 F.Supp 1150 (D.C. Cir. 1971) 10
Guam v. Guerrero, 209 F.3d 1210 (9th Cir. 2002) .. 5
Hankins v. Lyght, 441 F.3d 96 (2nd Cir. 2006) ... 5, 6
Henderson v. Kennedy, 265 F.3d 1072 (D.C.Cir. 2001) 5
Kikumura v. Hurley, 242 F.3d 950 (9th Cir. 2001) .. 5
McClure v. The Salvation Army, 460 F.2d 553 (5th Cir. 1972) 5, 6, 10
Madison v. Riter, 355 F.3d 310 (4th Cir. 2003) 5
Minker v. Baltimore Annual Conference of the United Methodist Church, 894 F.2d 1354 (D.C. Cir. 1990) 6
Natal v. Christian & Missionary Alliance, 878 F.2d 1575 (1st Cir. 1989) 5
O'Bryan v. Bureau of Prisons, 349 F.3d 399 (7th Cir. 2003) 3
Petruska v. Gannon University, et al, 448 F.3d 615 (3rd Cir. 2006) 6
Reverend Pamela Combs v. The Central Texas Annual Conference of the United Methodist

Church, et al., 173 F.3d 343 (5th Cir. 1999) 5, 6, 9
Scharon v. St. Luke's Episcopal Presbyterian Hospital, 929 F.2d 360 (8th Cir. 1991) 5
Sherbert v. Verner, 374 U.S. 398 (1963) 4, 9
Werft v. Desert S.W. Annual Conference of the United Methodist Church, 377 F.3d 1099 (9th Cir. 2004) 6
Young v. N. Ill. Conference Of United Methodist Church, 21 F.3d 184 (7th Cir. 1994) 5

Statutes

42 U.S.C. §1981 ..... 3, 7
42 U.S.C. §2000e *et seq.* 8
42 U.S.C. §2000bb-1(b) 1, 4

Other Authorities

U.S. Department of Labor, Bureau of Labor Statistics, *at* http://www.bls.gov/oes/current/oes212011.htm (last visited March 25, 2007) 6

PETITION FOR A WRIT OF CERTIORARI

Petitioner, Peter Boggan, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit (Pet. App. 1a-2a) is unpublished. The district court's order granting the motion to dismiss in favor of respondent (Pet. App. 3a-9a), dated May 5, 2006, is unpublished.

JURISDICTION

The judgment of the court of appeals was entered on February 1, 2007. This Court has jurisdiction pursuant to 28 U.S.C. 1254(1).

RELEVANT STATUTORY PROVISION

The Religious Freedom Restoration Act (RFRA) provides the following:

> (1) Whether the claims sought by the plaintiff are in furtherance of a compelling governmental interest; and
> (2) Whether those claims are the least restrictive means of furthering that compelling governmental interest.

42 U.S.C. §2000bb-1(b).

STATEMENT

Petitioner alleges that respondent violated Title VII of the Civil Rights Act of 1964 by placing him on administrative leave without pay for not spending the night at the church's parsonage for at least five (5) nights out of the week while numerous white pastors who do not spend the night at their church's parsonage for at least five (5) nights out of the week had no adverse action taken against them. In addition, petitioner and other black pastors who are employed by the respondent have not been promoted to higher paying church positions because of their race.

It is alleged that the respondent has continually only offered churches with majority black congregations to its black pastors, which on average pay less to their pastors than churches with majority white congregations while numerous white pastors with less experience are promoted over black pastors with more experience to churches with higher salaries. Respondent has argued that Title VII does not apply because of an alleged ministerial exception. In the current case, the Fifth Circuit continued to maintain a split in the circuits by holding that the RFRA does not apply to federal law.

1. Reverend Boggan, filed his charge of discrimination against the Mississippi Conference of the United Methodist Church with the Equal Employment Opportunity Commission on March 31, 2005, alleging race discrimination. He was issued a Notice of Right to Sue letter by the Equal Employment Opportunity Commission on July 1, 2005 and proceeded to file his Complaint against the respondent

on Aug[illegible], 2005 in the Circuit Court for the First Judicial [illegible]trict of Hinds County, Mississippi.

2. In his Complaint, petitioner alleged claims of race discrimination pursuant to Title VII of the Civil Rights Act of 1964 and 42 U.S.C. § 1981. The respondent consented to the jurisdiction of and removed the current case to the United Stated District Court for the Southern District of Mississippi, Jackson Division on September 12, 2005. On October 11, 2005, respondent filed its Answer wherein its sixth defense, the respondent plead the doctrine of the "ministerial exception." Subsequently, on March 2, 2006, the respondent filed its Motion to Dismiss alleging that the respondent is exempt from the requirements and provisions of Title VII and 42 U.S.C. § 1981, under the so-called "ministerial exception." On May 5, 2006, the district court granted the respondent's motion to dismiss.

3. On May 10, 2006, the petitioner appealed the district courts opinion to the United States Court of Appeals for the Fifth Circuit. On February 1, 2007, the Fifth Circuit affirmed the district court's opinion that the RFRA was unconstitutional as it applies to federal law, and that an alleged "ministerial exception" applies to Title VII claims of race discrimination.

This petition followed.

REASONS FOR GRANTING THE WRIT

The circuits are intractably split over both questions presented by the petitioner. Given the importance of the RFRA and Title VII, such a conflict is untenable. This case presents the ideal vehicle to decide these important and frequently litigated issues. Finally, the Fifth Circuit erred in concluding that the RFRA is unconstitutional as applied to federal law, and that an alleged "ministerial exception" exists under Title VII.

I. The Courts of Appeals Are Intractably Split over the Questions Presented.

In response to this Court's opinion in *Employment Division, Department of Human Resources of Oregon, et al. v. Smith*, 494 U.S. 872 (1990), Congress passed the RFRA, creating a two-part test:

> (1) Whether the claims sought by the plaintiff are in furtherance of a compelling governmental interest; and
> (2) Whether those claims are the least restrictive means of furthering that compelling governmental interest.

42 U.S.C. §2000bb-1(b). The intent of Congress in enacting the RFRA was clearly to reestablish the "compelling interest" test set out in *Sherbert v. Verner*, 374 U.S. 398 (1963). This Court later declared that the RFRA exceeded Congress' Section 5 enforcement powers in *City of Boerne v. P.F. Flores, et al.*, 521 U.S. 507 (1997), and held that the RFRA

was unconstitutional as it applies to state law.

While this Court has not addressed the constitutionality of the RFRA as it applies to federal law, six circuits -the Second, Fourth, Seventh, Eighth, Ninth, and D.C. Circuit- squarely hold that the RFRA is constitutional when applied to federal law. *Hankins v. Lyght*, 441 F.3d 96, 105 (2nd Cir. 2006); *See also O'Bryan v. Bureau of Prisons*, 349 F.3d 399, 401 (7th Cir. 2003); *Guam v. Guerrero*, 209 F.3d 1210, 1221 (9th Cir. 2002); *Henderson v. Kennedy*, 265 F.3d 1072, 1073 (D.C.Cir. 2001); *Kikumura v. Hurley*, 242 F.3d 950, 960 (9th Cir. 2001); *Christians v. Crystal Evangelical Free Church (In re Young)*, 141 F.3d 854, 856 (8th Cir. 1998) and *Madison v. Riter*, 355 F.3d 310, 315 (4th Cir. 2003). In contrast, the Fifth Circuit has held that the RFRA is unconstitutional when applied to federal law. *Reverend Pamela Combs v. The Central Texas Annual Conference of the United Methodist Church, et al.*, 173 F.3d 343 (5th Cir. 1999).

Additionally, this Court has made no opinion as to the applicability of the alleged "ministerial exception" to Title VII. In 1972, the Fifth Circuit acknowledged the existence of an alleged "ministerial exception" to Title VII. *McClure v. The Salvation Army* 460 F.2d 553 (5th Cir. 1972), *cert. denied*, 409 U.S. 896 (1972). Since this opinion was published, a total of seven additional circuits have acknowledged the alleged "ministerial exception." *Natal v. Christian & Missionary Alliance*, 878 F.2d 1575 (1st Cir. 1989); *E.E.O.C. v. Roman Catholic Diocese of Raleigh, N.C.*, 213 F.3d 795 (4th Cir. 2000); *Young v. N. Ill. Conference Of United Methodist Church*, 21 F.3d 184 (7th Cir. 1994); *Scharon v. St. Luke's Episcopal*

Presbyterian Hospital, 929 F.2d 360 (8th Cir. 1991); *Werft v. Desert S.W. Annual Conference of the United Methodist Church,* 377 F.3d 1099 (9th Cir. 2004); *Gellington v. Christian Methodist Episcopal Church, Inc.,* 203 F.3d 1299 (11th Cir. 2000); *Petruska v. Gannon University, et al,* 448 F.3d 615 (3rd Cir. 2006) and *Minker v. Baltimore Annual Conference of the United Methodist Church,* 894 F.2d 1354 (D.C. Cir. 1990). In contrast, the Second Circuit held that "ministerial exception" to Title VII did not exist. *Hankins v. Lyght,* 441 F.3d 96, 105 (2nd Cir. 2006).

While numerous circuits have discussed the constitutionality of the RFRA and the alleged "ministerial exception" to Title VII, only two circuits have addressed the applicability of the RFRA to Title VII and the "ministerial exception." *See Hankins v. Lyght,* 441 F.3d 96, 105 (2nd Cir. 2006); *Reverend Pamela Combs v. The Central Texas Annual Conference of the United Methodist Church, et al.,* 173 F.3d 343 (5th Cir. 1999).

II. The Circuit Conflict is Untenable Given the Importance of the Questions Presented.

Millions of employees currently employed in the United States are protected by Title VII. As of May 2005, there were an estimated 36,590 clergy employed across the United States. U.S. Department of Labor, Bureau of Labor Statistics, at http://www.bls.gov/oes/current/oes212011.htm (last visited March 25, 2007). Because the Act covers so many employees, the questions presented are of great importance to the national economy and to the issue of separation of church and State.

It is therefore unsurprising that nine circuits have taken a position on the "ministerial exception," seven circuits have taken a position on the constitutionality of the RFRA, and some have faced these same issues repeatedly. The importance of this question is heightened because it is outcome determinative. Where claims of race discrimination by clergy are available, they are able to vindicate their rights in the federal courts. In contrast, where the cognizability of such claims have been rejected, pastors are left without a remedy when they have been subjected to policies that unfairly disadvantage them and subject them to race discrimination.

The frequent recurrence of this issue and its importance to thousands of Americans makes the conflict among the circuits untenable. Under the current legal regime, the scope of an employee's federal rights varies within the location of his or her employment. As long as the circuits disagree, pastors in Jackson, New York (within the Second Circuit) are protected against race discrimination, whereas pastors in Jackson, Mississippi (within the Fifth Circuit) are not. The present situation also creates special difficulties for employees of religious organizations with multiple locations nationwide, most of whom are likely unaware that the acceptance of a transfer or promotion to another location may strip them of rights that they would otherwise have. Indeed, forum selection clauses in employment contracts may deprive even those employees who work within circuits that do not recognize the "ministerial exception" of the rights enjoyed by their neighbors.

The central role that Title VII, 42 U.S.C. §

1981 and the RFRA plays in thousands of Americans *employment relationships underscores the need for* clear guidance from this Court.

III. The Fifth Circuit's Decision is Wrong on the Merits.

Congress enacted Title VII in 1964 to forbid employers to "fail or refuse to hire or to discharge any individual, or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race..." 42 U.S.C. § 2000e-2(a)(1). Originally, the House version of §702 contained in H.R. 7152 granted religious organizations a blanket exemption from the provisions of Title VII. Yet, the exemption proposed by the House was sizeably limited by Substitute Senate Amendment No. 656, which was what ultimately became law.

This Amendment removed the generalized exemption of religious organizations. All that remained was a narrowly tailored exemption that allowed a particular denomination to refuse to hire anyone who is not of that denomination for positions involving ministerial functions. Clearly, the language and history of §702 leads one to believe that Congress did not intend that a religious organization should be exempt from the dictates of §702 merely because it is a religious organization.

Though the Fifth Circuit recognized the desire of Congress to prevent generalized legislative exemption in *McClure*, the Fifth Circuit became the first circuit to judicially recognize the "ministerial

exception" by refusing to apply the "compelling interest" test created by the Supreme Court in *Sherbert v. Verner,* 374 U.S. 398 (1963). Congress later incorporated the "compelling interest" test into statute by enacting the RFRA.

While the Fifth Circuit has declared that the RFRA was held unconstitutional as it applies to federal law, the Fifth Circuit has never given any explanation as to why it contends the RFRA is unconstitutional as applied to federal law. *Combs,* 173 F.3d 343 (5th Cir. 1999). This Court declared the RFRA unconstitutional as it applies to state law because it exceeded Congress' Section 5 enforcement powers. *City of Boerne,* 521 U.S. 507 (1997). Essentially, this Court found that Congress had created a law that surpassed the protections of the Fourteenth Amendment, and thus violated the separation of powers between federal and state. *Id.* While there is no dispute as to the reason why the RFRA is unconstitutional as applied to state law, that same reasoning would not hold true when the RFRA is applied to federal law.

The Fifth Circuit has argued that an individual's pursuit of a Title VII claim would involve a "governmental action" in the *McClure* case when it states:

> An application of the provisions of Title VII to the employment relationship which exists between The Salvation Army and Mrs. McClure, a church and its minister, would involve an investigation and review of these practices and decisions and

> would, as a result, **cause the State to intude upon matters of church administration** ...

McClure, 460 F.2d at 560 (emphasis added). Title VII is a neutral law designed to apply to every employer in order to protect every employee from discriminatory treatment.

> There is a compelling as well as reasonable government interest in the interdiction of racial discrimination which stands on the highest constitutional ground, taking into account the provisions and penumbra of the Amendments passed in the wake of the Civil War.

Green v. Connally, 330 F.Supp. 1150, 1167 (D.C. Cir. 1971). As such, it is clear that Title VII prohibits racial discrimination of pastors, and that the alleged "ministerial exception" does not exist.

Unless settled by this Court, this intractable and widely acknowledged split among the courts of appeals will continue to produce results that arbitrarily differ according to the jurisdiction in which Title VII claims brought by pastors are litigated. As a prototypical racial discrimination claim by a pastor, this case would serve as an ideal vehicle to examine whether an alleged "ministerial exception" actually exists. Finally, the decision reached by the court below incorrectly barred

petitioner's Title VII claim, and should be reversed.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should
be granted.

Respectfully submitted,

Louis H. Watson, Jr.
Louis H. Watson, Jr., P.A.
520 E. Capitol Street
Jackson, Mississippi 39201
(601) 968-0000

April 27, 2007[1]

---

[1] Counsel for petitioner was principally assisted by Robert Nicholas Norris, who is an associate with Louis H. Watson, Jr., P.A. that will be seeking admission before this Court at the completion of his third year of practice in October 2007.

APPENDICES

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 06-60782

PETER BOGGAN,

Plaintiff-Appellant

MISSISSIPPI CONFERENCE OF THE
UNITED METHODIST CHURCH,

Defendant-Appellee

Appeal from the United States District Court
the Southern District of Mississippi
(3:05-CV-553)

BEFORE SMITH, WIENER, and OWEN, Circuit Judges.
PER CURIAM:*

Plaintiff-Appellant Peter Boggan, a Methodist minister

---

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

previously employed as a pastor by Defendant-Appellee Mississippi Conference of the United Methodist Church ("MCUMC"), appeals the district court's Rule 12(b)(6) dismissal of his Title VII and 42 U.S.C. § 1981 action grounded in race discrimination. As fully explained by the court in its Memorandum Opinion and Order of May 5, 2006, Boggan's claims failed to present any basis for possible recovery, as they are among the larger class of employment discrimination claims that are barred by the so-called minister-clergy exception, which is firmly rooted in the Free Exercise clause of the First Amendment to the United States Constitution. The district court rejected both of Boggan's alternative arguments, viz., that (1) our holdings in Combs v. Central Texas Annual Conference of the United Methodist Church, 173 F.2d 343 (5th Cir. 1999) and Starkman v. Evans, 198 F.3d 173 (5th Cir. 1999), which continued to approbate this exception, are not good law and should be rejected by this court, and (2) alternatively, his claim remains cognizable because elimination of race discrimination, as compelling government interest, should be addressed under the two-part test of the Religious Freedom Restoration Act ("RFRA"), by application of Title VII and § 1981, if —— as Boggan contends —— the Supreme Court's declaration of the RFRA's unconstitutionality in City of Boerne v. Flores, 521 U.S. 507 (1997) does not apply to federal law.

Having thoroughly reviewed the facts of this case and the applicable law as reflected in the record on appeal and the briefs of the parties, we are convinced that the district court ruled correctly in dismissing Boggan's action under Rule 12(b)(6). Our 1999 holdings in Combs and Starkman remain fully viable and controlling. Unless they are nullified by some future holding of the Supreme Court of the United States or by this court en banc, the courts of this circuit continue to be bound by the holdings of Combs and Starkman. For

essentially the reasons cogently and correctly expressed by the district court, its judgment of dismissal is, in all respects, AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

PETER BOGAN PLAINTIFF

VS. CIVIL ACTION NO. 3:05CV553LN

MISSISSIPPI CONFERENCE OF THE
UNITED METHODIST CHURCH DEFENDANT

MEMORANDUM OPINION AND ORDER

This cause is before the court on the motion of defendant Mississippi Conference of the United Methodist Church (Mississippi Conference) to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. Plaintiff Peter Bogan has responded in opposition to the motion and the court, having considered the memoranda of authorities, together with attachments, concludes that defendant's motion is well taken and should be granted.

According to his complaint filed on August 5, 2005 in the Circuit Court of Hinds County, Mississippi, plaintiff Peter Bogan, who is black, became employed by defendant Mississippi Conference as a pastor in 1979, and remained so employed until June 2004, when he was put in the position of having to resign after being placed on extended administrative leave without pay. He filed this action claiming race discrimination in violation of Title VII and 42 U.S.C. § 1981 based on allegations that (1) he was placed on administrative leave without pay in March 2004 for not spending the night at the church's parsonage for at least five nights out of the week,

while no adverse action has been taken against numerous Caucasian pastors who do not spend the night at their church parsonages five nights of the week, and that (2) he and other African-American pastors employed by defendant have not been promoted to higher paying church positions because of their race, as defendant has "continually only offered churches with majority African-American congregations to its African-American pastors, which on average pay less to their pastors than churches with majority white Caucasian congregations," and that as a result, "[n]umerous Caucasian pastors with less experience are promoted over African-American pastors with more experience to churches with higher paying salaries."

In light of the federal nature of plaintiff's claims, defendant removed the case, and thereafter filed the present motion to dismiss, contending that it is immune from the claims asserted by plaintiff due to the "ministerial exception," or "minister-clergy exception," to employment discrimination claims, first articulated by the Fifth Circuit in McClure v. Salvation Army, 460 F.2d 553 (5th Cir. 1972).

In McClure, the Fifth Circuit held that the Free Exercise Clause of the First Amendment** precludes courts from intruding into the employment relationship between a church and its ministerial employees. After observing that the First Amendment has built a "high and impregnable" "'wall of separation'" between church and state, id. (citations omitted), the court explained,

> Only in rare instances where a

**The First Amendment provides, in part, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; . . ."

> "compelling state interest in the regulation of a subject within the State's constitutional power to regulate" is shown can a court uphold state action which imposes even an "incidental burden" on the free exercise of religion. In this highly sensitive constitutional area "'[o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation'". Sherbert v. Verner, 374 U.S. 398, 83 S. Ct. 1790, 10 L. Ed. 2d 965 (1963). Restrictions on the free exercise of religion are allowed only when it is necessary "to prevent grave and immediate danger to interests which the state may lawfully protect".

Id. Characterizing the relationship between an organized church and its ministers as "its lifeblood," the court observed,

> The minister is the chief instrument by which the church seeks to fulfill its purpose. Matters touching this relationship must necessarily be recognized as of prime ecclesiastical concern. Just as the initial function of selecting a minister is a matter of church administration and government,

> so are the functions which accompany such a selection. It is unavoidably true that these include the determination of a minister's salary, his place of assignment, and the duty he is to perform in the furtherance of the religious mission of the church.

Id. at 558-59; id. at 559 (practice of religious denominations to determine matters dealing with "the very terms of a minister's calling" is "both basic and traditional"). Then, after referencing and discussing a number of Supreme Court cases which collectively expressed "'a spirit of freedom for religious organizations, an independence from secular control or manipulation, in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine[,]'" id. at 560 (quoting Kedroff v. St. Nicholas Cathedral, 344 U.S. 94, 116, 73 S. Ct. 143, 154, 97 L. Ed. 120 (1952)),*** the court concluded that "the application of the provisions of Title VII to the employment relationship existing between . . . a church and its minister would result in an encroachment by the State into an area of religious freedom which it is forbidden to enter by the principles of the free exercise clause of the First Amendment." Id. The court elaborated on this notion, stating,

> An application of the provisions

***See also McClure, 460 F.2d at 560 (describing succession of cases in which the Supreme Court had "place[d] matters of church government and administration beyond the purview of civil authorities) (citing, inter alia, Watson v. Jones, 13 Wall. 679 80 U.S. 679, 20 L. Ed. 666 (1871)).

of Title VII to the employment relationship which exists between . . . a church and its minister, would involve an investigation and review of these practices and decisions and would, as a result, cause the State to intrude upon matters of church administration and government which have so many times before been proclaimed to be matters of a singular ecclesiastical concern. Control of strictly ecclesiastical matters could easily pass from the church to the State. The church would then be without the power to decide for itself, free from state interference, matters of church administration and government. Moreover, in addition to injecting the State into substantive ecclesiastical matters, an investigation and review of such matters of church administration and government as a minister's salary, his place of assignment and his duty, which involve a person at the heart of any religious organization, could only produce by its coercive effect the very opposite of that separation of church and State contemplated by the First Amendment. As was

> said by Justice Clark in School District of Abington Tp., Pa. v. Schempp, 374 U.S. 203, 83 S. Ct. 1560, 10 L. Ed. 2d 844 (1963), "the breach of neutrality that is today a trickling stream may all too soon become a raging torrent * * *".

Id.

In response to defendant's motion, plaintiff argues that McClure's ministerial exception is no longer valid in the wake of the Supreme Court's subsequent decision in Employment Division, Department of Human Resources of Oregon v. Smith, 494 U.S. 872, 110 S. Ct. 1595, 108 L. Ed. 2d 876 (1990), in which the Supreme court specifically rejected the "compelling state interest" test set forth in Sherbert v. Verner, 374 U.S. 398, 83 S. Ct. 1790, 10 L. Ed. 2d 965 (1963), which the Fifth Circuit referenced in McClure. The court in Smith held that "the right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)." Id. at 879, 110 S. Ct. at 1600 (citations and internal quotation marks omitted).

Plaintiff notes that although Congress passed the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb et seq. (RFRA), in response to the Supreme Court's decision in Smith for the stated purpose of restoring the "compelling interest" test of Sherbert, the Supreme Court held RFRA to be unconstitutional in City of Boerne v. Flores, 521 U.S. 507, 117 S. Ct. 2157, 138 L. Ed. 2d 624 (1997), and returned to the analysis in Smith. Plaintiff reasons that in light of Smith's

rejection of Sherbert's "compelling interest" standard, upon which McClure relied, it follows that McClure's ministerial exception cannot stand.

The problem with this argument, however, is that it has been squarely rejected by the Fifth Circuit. In Combs v. Central Texas Annual Conference of the United Methodist Church, the plaintiff questioned whether "McClure and its church minister exception still stand in light of the Supreme Court's decision in [Smith]." 173 F.3d 343, 345 (5th Cir. 1999). The court concluded that "[the] fundamental right of churches to be free from government interference in their internal management and administration has not been affected by the Supreme Court's decision in Smith and the demise of Sherbert," id. at 350, and in so holding, stated,

> We . . . disagree with Reverend Combs's argument that McClure is no longer good law because it relied on the "compelling state interest" test rejected by the Supreme Court in Smith. Our review of McClure reveals that although this Court presented the "compelling state interest" test in its general discussion of First Amendment law, the test is never applied or even mentioned later in the opinion. Thus, it is unclear how much this Court was actually relying on this test. Moreover, even if the McClure panel was relying on the Sherbert test, we hold that the church-minister exception

> survives Sherbert's demise. As the D.C. Circuit observed in Catholic University, the primary doctrinal underpinning of the church-minister exception is not the Sherbert test, but the principle that churches must be free "to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." Kedroff, 344 U.S. at 116, 73 S.Ct. at 154 (cited by this Court in McClure, 460 F.2d at 560, and by the D.C. Circuit in Catholic University, 83 F.3d at 462).

In his response brief, plaintiff acknowledges Combs' holding, and he acknowledges, additionally, that even subsequent to Combs, the Fifth Circuit has expanded the ministerial exception to other employees of a religious organization besides ministers where such employees' job responsibilities require them to perform ministerial functions. See Starkman v. Evans, 198 F.3d 173 (5th Cir. 1999). In essence, though, he argues that the court in Combs came to the wrong conclusion and that this court ought recognize as much. The court is neither persuaded that Combs was wrong nor that this court would be free to disregard the Fifth Circuit's decision, even if it were not inclined to agree with it.****

****The fact that other circuits (though a minority of them) may have reached a contrary conclusion to McClure and Combs is of no moment, and thus plaintiff's citation to those

Plaintiff argues alternatively that "if, in fact, the Religious Freedom Restoration Act was not previously held unconstitutional as it applies to federal law in the Boerne case," then this court must apply the RFRA's two-part test which asks (1) whether the claims sought by the Plaintiff are in furtherance of a compelling governmental interest; and (2) whether those claims are the least restrictive means of furthering that compelling governmental interest. 42 U.S.C. § 2000bb-1(b). Plaintiff reasons that pursuant to RFRA, his claim herein is cognizable since the elimination of race discrimination is clearly a compelling government interest and since Title VII and § 1981 are clearly the least restrictive means of furthering that interest.

Defendant submits that plaintiff's reliance on RFRA is irrelevant and misplaced for a number of reasons, including that (1) RFRA has been declared unconstitutional, without any distinction between state and federal laws, see City of Boerne, 521 U.S. 507, 117 S. Ct. 2157, 138 L. Ed. 2d 624; (2) RFRA has not been raised in any pleading by either party to this case; and (3) RFRA does not apply to suits between private parties but rather only applies to governmental action, see 42 U.S.C. § 2000bb-1.***** Finally, it contends that even if the RFRA is

---

cases avails him nothing.

***** This statute provides as follows:

(a) In general. Government shall not substantially burden a person's exercise of religion if the burden results from a rule of general applicability, except as provided in subsection (b).

(b) Exception. Government may substantially burden a person's exercise of religion only if it demonstrates that the application of the burden to the person –

relevant, plaintiff's claims do not involve any burden, much less substantial burden, on his religious practice, which is the relevant inquiry under the RFRA. Defendant's argument is correct on each of these points.

Accordingly, it is order that defendant's motion to dismiss is granted.******

A separate judgment will be entered in accordance with Rule 58 of the Federal Rules of Civil Procedure.

SO ORDERED this 5th day of May, 2006.

---

(1) is in furtherance of a compelling government interest; and
(2) is the least restrictive means of furthering that compelling governmental interest.

(c) A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government.

See also 42 U.S.C. § 2000bb(b)(2) (describing one of purposes of RFRA as follows: "to provide a claim or defense to persons whose religious exercise is substantially burdened by government").

****** Defendant has requested an award of reasonable attorneys' fees and costs because plaintiff's complaint is frivolous and was filed "without substantial justification" in violation of Rule 11 and Mississippi Code Annotated § 11-55-3(a). The court declines this request, except as to costs, which may properly be assessed to plaintiff.

/s/ Tom S. Lee
UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

PETER BOGAN PLAINTIFF

VS. CIVIL ACTION NO. 3:05CV553LN

MISSISSIPPI CONFERENCE OF THE
UNITED METHODIST CHURCH

DEFENDANT

JUDGMENT

Based on the court's order memorandum opinion and order entered this date, it is ordered and adjudged that the complaint in this cause is dismissed.

SO ORDERED AND ADJUDGED this 5th day of May, 2006.

/s/ Tom S. Lee
UNITED STATES DISTRICT JUDGE

60

(2)

No. 06-1459

Supreme Court, U.S.
FILED
JUL 5 - 2007
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

PETER BOGGAN,

Petitioner,

v.

MISSISSIPPI CONFERENCE OF THE UNITED METHODIST CHURCH,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

JOSEPH E. LOTTERHOS
Counsel of Record
CHARLES FRANK FAIR BARBOUR
BENNETT LOTTERHOS SULSER & WILSON, P.A.
188 East Capitol Street
Suite 1400
Jackson, Mississippi 39201
(601) 944-0466

Counsel for Respondent

209562

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Respondent, Mississippi Conference of United Methodist Church, is a religious institution that is a Mississippi not for profit corporation with no publicly traded stock.

TABLE OF CONTENTS

	Page
CORPORATE DISCLOSURE STATEMENT	i
TABLE OF CONTENTS	ii
TABLE OF CITED AUTHORITIES	iii
RELEVANT STATUTORY PROVISIONS	1
STATEMENT OF THE CASE	2
REASONS FOR DENYING THE PETITION	3
I. The RFRA is not applicable to this case	4
A. The RFRA was not raised by either party as a claim or a defense	4
B. The RFRA does not apply to disputes between private parties	5
C. Plaintiff's exercise of religion has not been substantially burdened	7
II. The Courts of Appeals are not intractably split over the questions presented	8
A. The RFRA	8
B. The ministerial exception	8
III. The Courts Below Correctly Ruled in this Case	12
CONCLUSION	13

TABLE OF CITED AUTHORITIES

Page

Cases:

Alicea-Hernandez v. Catholic Bishop of Chicago,
320 F.3d 698 (7th Cir. 2003) 9

American Life League, Inc. v. Reno,
47 F.3d 642 (4th Cir. 1995) 7

Bryce v. Episcopal Church in the Diocese of Colorado,
289 F.3d 648 (10th Cir. 2002) 10

Christians v. Crystal Evangelical Free Church,
141 F.3d 854 (8th Cir. 1998) 6

City of Boerne v. Flores,
521 U.S. 507 (1997) 4

Combs v. Central Texas Ann. Conf. of the United Methodist Church,
173 F.3d 343 (5th Cir. 1999) 4

E.E.O.C. v. Roman Catholic Diocese of Raleigh, NC,
213 F.3d 795 (4th Cir. 2000) 8

Employment Division, Dep't of Human Resources of Oregon v. Smith,
494 U.S. 872 (1990) 4

Cited Authorities

Page

Gellington v. Christian Methodist Episcopal Church, Inc., 203 F.3d 1299 (11th Cir. 2000) 9

Gonzales v. O Centro Espirita, 546 U.S. 418 (2006) 10, 11

Guam v. Guerro, 290 F.3d 1210 (9th Cir. 2002) 6

Hankins v. Lyght, 441 F.3d 96 (2d Cir. 2006) 5, 6, 10

Henderson v. Kennedy, 265 F.3d 1072 (D.C. Cir. 2001) 6

Hollins v. Methodist Healthcare, Inc., 474 F.3d 223 (6th Cir. 2007) 9

Kikumura v. Hurley, 242 F.3d 950 (10th Cir. 2001) 6

Madison v. Riter, 355 F.3d 310 (4th Cir. 2003) 6

Manley v. Fordice, 945 F. Supp. 132 (S.D. Miss. 1996) 7

McClure v. Salvation Army, 460 F.2d 553 (5th Cir. 1972) 2, 9

Cited Authorities

Page

Natal v. Christian and Missionary Alliance,
878 F.2d 1575 (1st Cir. 1989) 8

O'Bryan v. Bureau of Prisons,
349 F.3d 399 (7th Cir. 2003) 6

Pardue v. Center City Consortium Schools of the Archdiocese of Washington, Inc.,
875 A.2d 669 (D.C. 2005) 9

Petruska v. Gannon University,
462 F.3d 294 (3d Cir. 2006) 8

Redhead v. Conference of Seventh-Day Adventists,
440 F. Supp. 2d 211 (E.D.N.Y. 2006) 10, 11

Scharon v. St. Luke's Episcopal Presbyterian Hosps.,
929 F.2d 360 (8th Cir. 1991) 9

Sutton v. Providence St. Joseph Medical Center,
192 F.3d 826 (9th Cir. 1999) 6

Tomic v. Catholic Diocese of Peoria,
442 F.3d 1036 (7th Cir. 2006) 6, 11

Werft v. Desert Southwest Annual Conf. of the United Methodist Church,
377 F.3d 1099 (9th Cir. 2004) 9

Worldwide Church of God v. Philadelphia Church of God, Inc.,
227 F.3d 1110 (9th Cir. 2000) 6

Cited Authorities

Page

Statutes:

42 U.S.C. § 1981 ..... 1, 4

42 U.S.C. § 2000bb 5

42 U.S.C. § 2000bb-1 ..... 1, 2, 5, 6

42 U.S.C. § 2000bb-1(b) 6

42 U.S.C. § 2000bb-1(c) 6

42 U.S.C. § 2000bb(b)(1-2) 2

Title VII 1, 2, 4, 8

RELEVANT STATUTORY PROVISIONS

Although Petitioner's Complaint is based upon Title VII and 42 U.S.C. § 1981, the petition raises only the Religious Freedom Restoration Act ("RFRA") as the relevant statutory provision. In addition to Petitioner's statutory provisions, Respondent submits the RFRA's substantive provisions states in full the following:

42 U.S.C. § 2000bb-1

> (a) In general. Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section.
>
> (b) Exception. Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person—
>
> > (1) is in furtherance of a compelling governmental interest; and
> >
> > (2) is the least restrictive means of furthering that compelling governmental interest.
>
> (c) Judicial relief. A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. Standing to assert a claim or defense under this section shall be governed by the general rules of standing under article III of the Constitution.

42 U.S.C. § 2000bb-1. According to section 2000bb, the purposes of the RFRA are as follows:

> (1) to restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened; and
>
> (2) to provide a claim or defense to persons whose religious exercise is substantially burdened by government.

42 U.S.C. § 2000bb(b)(1-2).

STATEMENT OF THE CASE

Petitioner filed his Complaint under Title VII of the Civil Rights Act of 1964 against the Mississippi Conference of the United Methodist Church ("Respondent") alleging racial discrimination in his employment. Petitioner's allegations of discrimination are not at issue in this appeal. The issue is jurisdictional – whether the Federal courts have the authority to look into employment practices of a church. According to the ministerial exception (also referred to as the "minister-clergy exception") as pronounced by the Fifth Circuit in *McClure v. Salvation Army*, 460 F.2d 553 (5th Cir. 1972) and followed by nine other Circuits, the Free Exercise Clause of the First Amendment precludes courts from intruding into the employment relationship between a church and its ministerial employees.

REASONS FOR DENYING THE PETITION

Petitioner has presented no "compelling reason" for his Petition for a Writ of *Certiorari* to be granted. *See* Sup. Ct. R. 10. Petitioner asserts that this case presents the ideal vehicle to decide his questions presented. However, this case is less than ideal since Petitioner's questions presented are not even the relevant issues presented to the District Court and Fifth Circuit Court of Appeals. Should Petitioner wish to seek this Courts determination as to the application of the RFRA, such determination should involve a case that actually includes the RFRA as an actual issue.

Petitioner's questions presented essentially revolve around the application of the RFRA. However, the RFRA should not be at issue in this appeal: (a) the RFRA was not raised as a claim or defense by either party, (b) the RFRA does not apply to disputes between private parties as involved here, and (c) Petitioner cannot show that the government has enacted a federal law that has substantially burdened his exercise of religion.

Further, despite the statements by Petitioner, the Courts of Appeals are not intractably split over the application of the ministerial exception – ten (10) of the Circuits have upheld the ministerial as to Title VII claims while the other two have not squarely dealt with the issue.

The District Court and Fifth Circuit correctly ruled in favor of Respondent. Accordingly, no compelling reason exists in this case allowing this Court to grant a petition for writ of certiorari herein.

I. The RFRA is not applicable to this case.

Prior to responding to any of the assertions made by Plaintiff, it should be clearly noted that the RFRA should not even at issue in this case.

Petitioner's argument for application of the RFRA is based upon the requirement of review under a two part test from the RFRA – conditioned upon the instance that the RFRA as applied to Federal law is not unconstitutional.[1] This attempt by Petitioner should not be considered by this Court because (a) neither party raised the RFRA as a claim or as a defense in this case; (b) the RFRA does not apply to disputes between private parties; and (c) the RFRA is not applicable as Plaintiff cannot show that the government has enacted a federal law that has substantially burdened his exercise of religion.

A. The RFRA was not raised by either party as a claim or a defense.

Plaintiff's Complaint is based upon alleged violations of Title VII and 42 U.S.C. § 1981. Nowhere did Plaintiff asserted any claim under the RFRA, nor has Respondent raised the RFRA as a defense. Not until Respondent raised the RFRA in its response to Respondent's motion to dismiss did the RFRA surface.

---

1. The Fifth Circuit addressed the RFRA and its application in regard to the decision in *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990) by finding the RFRA to be unconstitutional. *Combs v. Central Texas Ann. Conf. of the United Methodist Church*, 173 F.3d 343, 348 (5th Cir. 1999); *see also City of Boerne v. Flores*, 521 U.S. 507 (1997). Regardless of whether the RFRA is unconstitutional as a whole or if the RFRA still applies to Federal laws is immaterial in this case.

Accordingly, Plaintiff's attempt to raise the RFRA or any application of the RFRA should not be considered by this Court.

B. The RFRA does not apply to disputes between private parties.

The RFRA prohibits federal governments from substantially burdening a person's exercise of religion unless the government could demonstrate that the burden is in furtherance of a compelling governmental interest and is the least restrictive means.

The RFRA's substantive provisions repeatedly state that "government" shall not substantially burden the exercise of religion and that the appropriate relief shall be "against a government". *See* 42 U.S.C. § 2000bb-1; 42 U.S.C. § 2000bb.

The plain language of the RFRA, its legislative history, and its interpretation by courts since its inception demonstrate that the RFRA does not apply to suits between private parties. *See Hankins v. Lyght*, 441 F.3d 96 (2d Cir. 2006) (Sotomayor, J., *dissenting*)

> the majority concedes that it is unable to locate a single court holding that directly supports its novel application of RFRA to a suit between private parties. . . . This is telling, for Congress enacted RFRA over twelve years ago. The plain language of the statute, its legislative history, and its interpretation by courts over the past twelve years demonstrate that RFRA does not apply to suits between private parties.

Each of the cases cited by Petitioner in regard to the RFRA being applicable to federal law includes some type of governmental entity as a party. *O'Bryan v. Bureau of Prisons*, 349 F.3d 399 (7th Cir. 2003) (federal prisoner sued governmental entity Bureau of Prisons under RFRA alleging infringement of his right to practice his religion); *Guam v. Guerro*, 290 F.3d 1210 (9th Cir. 2002) (individual indicted on violating governmental entity's controlled substance importation laws moved to dismiss indictment asserting importation laws violated the RFRA); *Henderson v. Kennedy*, 265 F.3d 1072 (D.C. Cir. 2001) (individuals brought action under RFRA challenging governmental entity National Park Service's regulation banning sales of message bearing t-shirts in designated sections of the national mall); *Kikumura v. Hurley*, 242 F.3d 950 (10th Cir. 2001) (federal prisoner brought suit under RFRA against governmental entity's prison officials for alleged denial of pastoral visits from Christian minister); *Christians v. Crystal Evangelical Free Church*, 141 F.3d 854 (8th Cir. 1998) (governmental entity's Chapter 7 bankruptcy trustee brought action under RFRA to recover preferential transfers of church tithes); *Madison v. Riter*, 355 F.3d 310 (4th Cir. 2003) (state prisoner brought action against government entity's prison officials under Religious Land Use and Institutionalized Persons Act challenging denial of his requests for kosher meals).

The Seventh Circuit has found that the decision in *Hankins* "is unsound" and that the RFRA is applicable only to suits to which the government is a party. *Tomic v. Catholic Diocese of Peoria*, 442 F.3d 1036, 1042 (7th Cir. 2006) *citing* 42 U.S.C. §§ 2000bb-1(b), (c); *Worldwide Church of God v. Philadelphia Church of God, Inc.*, 227 F.3d 1110, 1120-21 (9th Cir. 2000); *Sutton v. Providence St. Joseph Medical Center*, 192 F.3d 826, 834-35 (9th Cir. 1999). A proper claimant may "obtain appropriate relief against a government". 42 U.S.C. § 2000bb-1(c).

Clearly, no governmental entity is involved in this case nor is any law enacted by the government burdening Plaintiff's exercise of religion involved in this case. As such, the RFRA should not apply to this matter between private parties.

C. Plaintiff's exercise of religion has not been substantially burdened.

RFRA is not applicable as Plaintiff has not shown that the government has enacted a federal law that has substantially burdened his exercise of religion.

The threshold inquiry under the RFRA is whether Plaintiff demonstrates a substantial burden on his religious practice. *Manley v. Fordice*, 945 F. Supp. 132, 134 (S.D. Miss. 1996) *citing American Life League, Inc. v. Reno*, 47 F.3d 642 (4th Cir. 1995). In the present case, Plaintiff has failed to show any burden, much less a substantial burden, on his religious practice. The fact that Plaintiff is no longer a minister in the Mississippi Conference[2] does not present a burden upon his religious practice as he has ample alternative means of his religious practice.

Petitioner has not and is not able to show any burden, much less any substantial burden upon his exercise of religion. Accordingly, the RFRA does not apply in this case.

---

2. See Plaintiff's Complaint at p. 3.

II. The Courts of Appeals are not intractably split over the questions presented.

A. The RFRA.

Petitioner's assertion as to this Court not having addressed the constitutionality of the RFRA as it applies to Federal law is correct. Petitioner indicates that six circuits are in favor of the proposition that the RFRA is constitutional when applied to Federal law versus the one circuit against it. As stated previously, each of the six circuits through the cases cited by Petitioner in regard to the RFRA being applicable to federal law includes some type of governmental entity as a party. *See supra.*

The question as to whether or not the RFRA applies to Title VII through this case is not material.

B. The ministerial exception.

Contrary to Petitioner's statements[3], ten (10) circuits have not only "acknowledged" the ministerial exception, but those ten circuits have upheld the ministerial exception as to Title VII claims. *Natal v. Christian and Missionary Alliance*, 878 F.2d 1575, 1577 (1st Cir. 1989) (affirming dismissal of clergyman's wrongful termination claim based upon Free Exercise clause); *Petruska v. Gannon University*, 462 F.3d 294 (3d Cir. 2006) (ministerial exception applied to bar former chaplain's Title VII claims); *E.E.O.C. v. Roman Catholic Diocese of Raleigh, NC*, 213 F.3d 795 (4th Cir. 2000) (cathedral choir director required to assist in planning

3. Petitioner states that a total of eight circuits have acknowledged the alleged "ministerial exception". *See* Petition at p. 5.

liturgies); *McClure v. The Salvation Army*, 460 F.2d 553 (5th Cir. 1972) (The Church's practices relative to its ministers' assignments, salaries, and duties, the court concluded, were "matters of church administration and government and thus, purely of ecclesiastical cognizance" and application of Title VII would result in state interference in matters of church administration and government); *Hollins v. Methodist Healthcare, Inc.*, 474 F.3d 223 (6th Cir. 2007) (upholding the application of the ministerial exception precluding federal court subject matter jurisdiction); *Alicea-Hernandez v. Catholic Bishop of Chicago*, 320 F.3d 698 (7th Cir. 2003) (court lacked subject matter jurisdiction to address Title VII gender discrimination claims raised by plaintiff with ministerial duties); *Scharon v. St. Luke's Episcopal Presbyterian Hosps.*, 929 F.2d 360 (8th Cir. 1991) (court's adjudication of hospital chaplain's Title VII and age discrimination claims was barred by First Amendment); *Werft v. Desert Southwest Annual Conference of the United Methodist Church*, 377 F.3d 1099 (9th Cir. 2004) (minister's claims under Title VII were part of the employment relationship between church and minister and were therefore properly dismissed under the ministerial exception); *Gellington v. Christian Methodist Episcopal Church, Inc.*, 203 F.3d 1299 (11th Cir. 2000) (minister's Title VII claims that he was retaliated against and constructively discharged as a result of assisting a female minister in her sexual harassment complaint was barred by Free Exercise Clause and Establishment Clause); *Pardue v. Center City Consortium Schools of the Archdiocese of Washington, Inc.*, 875 A.2d 669 (D.C. 2005) (former Catholic school principal's suit alleging race discrimination and retaliation claims was denied because trial court lacked subject matter jurisdiction

over discrimination and retaliation claims under ministerial exception).[4]

Petitioner heavily relies on the case of *Hankins v. Lyght*, 441 F.3d 96 (2d Cir. 2006) in support of its claim regarding application of the RFRA instead of through the ministerial exception. In a split decision with a long dissent, the Second Circuit in *Hankins* did not specifically find that the ministerial exception does not exist. *Hankins*, 441 F.3d at 102 (labeling the ministerial exception "an unresolved issue in this circuit"). However, the divided *Hankins* court held that that Congress impliedly had amended the antidiscrimination statutes (the ADEA) to make them enforceable without regard to the free exercise clause of the first amendment. *Id.* at 103.

The United States District Court for the Eastern District of New York (which is included in the Second Circuit) in *Redhead v. Conference of Seventh-Day Adventists*, 440 F. Supp. 2d 211 (E.D.N.Y. 2006) followed *Hankins* but found that the RFRA and ministerial exception are not mutually exclusive. *Redhead v. Conference of Seventh-Day Adventists*, 440 F. Supp. 2d 211, 220 (E.D.N.Y. 2006) *citing Gonzales v. O Centro Espirita*, 546 U.S. 418 (2006) (holding "judicially crafted exceptions" relevant to RFRA analysis).

The Court in *Redhead* followed the Seventh Circuit in stating that "a serious constitutional issue would be presented if Congress by stripping away the ministerial exception

4. The remaining circuit not to address the ministerial exception is the Tenth Circuit. In the case of *Bryce v. Episcopal Church in the Diocese of Colorado*, 289 F.3d 648 (10th Cir. 2002), the Tenth Circuit mentioned the ministerial exception but did not apply it due to the claims being based solely on communications that are protected by the First Amendment under the broader church autonomy doctrine.

required federal courts to decide religious questions. The exception is based on the establishment and free-exercise clauses of the First Amendment . . . , which place tight limits on governmental authority to regulate religion." *Redhead*, 440 F. Supp. 2d at 220 *citing Tomic*, 442 F.3d at 1042. The court went on to state:

> [W]hether applied directly or through the RFRA, the ministerial exception guards against excessive entanglement and is a tool for analyzing the nature of the alleged burden on religious exercise. It is a judicially created doctrine relevant to whether a religious organization's hiring decisions regarding a particular individual should be insulated based on First Amendment concerns. Applying the ministerial exception strikes a proper balance between the important aims of Title VII in eliminating discrimination, on the one hand, and safeguarding "matters of church government as well as those of faith and doctrine," on the other hand. For the RFRA analysis in particular, the ministerial exception is necessary for a case-specific application of the compelling interest test and is the kind of judicially crafted exception envisioned by the Court in *O Centro Espirita.*

Id. (internal citations omitted).

Accordingly, the ministerial exception is applicable to the current case.

III. The Courts Below Correctly Ruled in this Case.

The District Court ruled that that ministerial exception precluded Petitioner's suit. The District Court then addressed Petitioner's alternative argument and found Petitioner's reliance on the RFRA was "irrelevant and misplaced". The Fifth Circuit upheld the District Court's ruling that Petitioner's claims were bared by the minister-clergy exception, but made no specific finding or ruling as to the RFRA.

Regardless of whether the RFRA is applicable, the Courts below correctly ruled using the ministerial exception. The ministerial exception is based on the Free Exercise and Establishment Clauses of the United States Constitution and exempts church employment decisions affecting ministerial employees. Applying Title VII to an employment relationship between a church and a minister would result in a constitutional violation because of the resultant encroachment by the State into an area of religious freedom that it is forbidden to enter by the principles of the Free Exercise Clause of the First Amendment.

CONCLUSION

Petitioner has not established any compelling reason for this Court to grant his Petition for a Writ of *Certiorari*. For the foregoing reasons, Respondent respectfully requests that the Petition be denied.

Respectfully submitted,

JOSEPH E. LOTTERHOS
Counsel of Record
CHARLES FRANK FAIR BARBOUR
BENNETT LOTTERHOS SULSER
& WILSON, P.A.
188 East Capitol Street
Suite 1400
Jackson, Mississippi 39201
(601) 944-0466

Counsel for Respondent